No. 83-1364

IN THE

Supreme Court of the United States

October Term, 1983

GERARD COLBY ZILG,

Petitioner,

v.

PRENTICE-HALL, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Counterstatement of Questions Presented

1. Should this Court exercise its supervisory power over federal courts to go outside the record and reverse a unanimous decision of a United States Court of Appeals because of the unsupported allegation that the Court of Appeals' decision was politically motivated, where the Court of Appeals explicitly rested its decision upon a plaintiff's failure to meet his burden of proof and the trial court's imposition of an erroneous state law standard to the facts before it?

2. Assuming, without conceding, that the Court of Appeals overturned findings of fact subject to F.R.Civ.P. 52, was that reversal fatally defective for having failed to employ the words "clearly erroneous" when the Court of Appeals explicitly found an absence of evidence in the record to support the findings?

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Counterstatement of the Case

The chronological gaps left by the Petition's Statement of the Case are crucial to any fair understanding of the Record. It will be noted that the Petition studiously avoids precise dating of events, preferring such usages as "in mid-1974," "after," and "as a consequence." (Petition, 8-9).

So, for example, the Petition's discussion of Judge Brieant's finding that Respondent Prentice-Hall, Inc. "*intentionally* permitted" [emphasis added] Petitioner's book to go temporarily out-of stock ignores the facts that the reduction in the first printing was ordered on September 9,

1974; that a reprinting was ordered December 26, 1974 (when over 10% of the original printing was still in stock) for January 30, 1974 delivery; that the reprint order was increased by 20% on December 31, 1974; and that the out-of-stock situation which arose in January[1] (and which the District Court termed "brief" (Petition, 84a)) was extended because of late delivery from a printer.

By avoiding reference to these lengthy gaps, the Petition does more than confuse: it obscures the fact that New York legal standards of good faith and reasonableness were supplanted in the District Court by an unprecedented standard of "best efforts" performance which involved hindsight criticism of a business executive's inability to prognosticate events as much as four months in the future.

Respondent argued vigorously in the Court of Appeals that many findings by the District Court of fact, of law, and of mixed fact and law were clearly erroneous, whether or not the standard of *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948) is applicable to all such categories. The Court of Appeals did not reach the question of the infirm findings of fact. Instead, the Court of Appeals chose to focus on the District Court's errors of law: redefining bad faith by the "best efforts" standard, shifting the burden of proof, and failing to recognize risk management as a legitimate business reason for Respondent's actions.

Nevertheless, Respondent must reserve the right to invoke the entire Record should this Court elect to grant the

1. The District Court did not make a finding as to the date on which the out-of-stock situation arose.

Petition, since manifest error by the District Court in its fact findings would have justified reversal by the Court of Appeals on the basis of the "clearly erroneous" rule had the Court of Appeals so elected.[2]

Summary of Argument

This case presents nothing more or less than disagreements between the District Court and the Court of Appeals (i) on how to construe a contract so as to rationalize potentially conflicting terms, (ii) on the scope of the implied duty of good faith which the common law of New York impresses on all contracts, and (iii) on whether risk management is a legitimate business purpose for the acts of a discretion-exercising party to a commercial contract. These

2. For example, the District Court simply misread the date of a document when it asserted that the first printing of the book was fixed at 15,000 copies a month before the execution of the Agreement for Fortune Book Club use. (Petition, 87a). It ignored uncontroverted documentary and testimonial evidence that Fortune Book Club and other Book of the Month Club, Inc. ("BOMI") operations had bought books and printed and folded sheets from Respondent to find that BOMI never did so, and grounded the serious charge of fabrication of evidence on that erroneous finding of BOMI's practices. It effectively ignored the existence of the wholesalers who had purchased half the book's initial printing in constructing consequences of the temporary "out-of-stock" situation nowhere supported by the Record. (*see* Petition, 108a n.37).

Equally gnawing but less consequential errors appear in the District Court opinion: one person who never testified and whose deposition was not introduced into evidence is said to have "testified at trial" (Petition, 26a); the Executive Vice-President of Houghton Mifflin Company, indisputably the best-credentialled expert to testify, is misidentified as an "employee of Doubleday" (Petition, 105a); and Petitioner is said to have "cancelled" an earlier contract for the book with David McKay Company (Petition, 26a), when the uncontested documentary evidence had it that McKay cancelled the contract when Petitioner failed to submit an acceptable manuscript.

are important issues, to be sure;[3] but they are issues of state law pure and simple.[4]

To the extent the Federal Rules of Civil Procedure are involved, Respondent argues that the construction of a contract to determine the scope of a party's contractual duties is an issue of law not subject to Rule 52. Respondent further argues that the Court of Appeals found an absence of evidence in the record on issues where Petitioner bore a substantial burden of proof, and properly reversed a District Court decision which effectively put that burden on Respondent.

The Court of Appeals held, in sum, that risk management (i.e., a publisher's right to control the amount of money it will invest in a project where it has no guarantee of return) was a legitimate business reason for Respondent to do as it did, given the uncontroverted evidence that Respondent's efforts for this book were, at a minimum (and in the words of Petitioner's own expert witness), "perfectly adequate" for the book to catch on with the public and be sold. In so holding, the Court of Appeals had no need to overrule any finding of fact by the District Court, and it did not do so.

The Petitioner invokes the First Amendment in suggesting that the three distinguished judges of the Court of Ap-

3. Though not for the reasons ascribed by the Petition, whose preposterous reference to the *amicus* appearance below by the Authors League of America (Petition, n.10) doesn't mention that the appearance—with the exception of two sentences in the League's Brief—dealt solely with the Petitioner's claim against the codefendant du Pont Company.

4. Although New York law governs the agreement of which breach is claimed, no New York cases on the scope of the implied duty of good faith are included in Petitioner's Table of Authorities.

peals who unanimously reversed the District Court violated their oaths of office by allowing Petitioner's politics to determine their decision. This charge is breathtakingly cynical: the District Court is exonerated of bias, despite what could be called its diatribe against the book (Petition, 36a-52a),[5] only because it ruled for Petitioner (Petition, n.11), while the only reason for inferring bias from the far milder Court of Appeals critique is that Petitioner lost in that Court. The Petition avoids any suggestion that the Court of Appeals may simply have been adopting District Court "findings of fact" as to the nature and appeal of the book.

No extensive argument will be presented on the charge of impropriety by the Court of Appeals, because a fair reading of the Court of Appeals' opinion demonstrates the objectivity of that bench. In any event, we are neither so clairvoyant nor so privy to the innermost thoughts and motives of the Court of Appeals as Petitioner claims to be.[6]

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5. As it happens, a great deal of Petitioner's Brief to the Court of Appeals constituted an attack on the District Court's alleged bias against Petitioner's politics in dismissing the case against the du Pont Company. Yet Petitioner has not sought review by this Court of either of the lower court decisions in favor of the du Pont Company, which one would think raise the same ersatz issue of political bias. Quite the contrary: Petitioner's description of Judge Brieant has gone from contumely to near-beatification.

6. The Petition further shows off its sensitivity to editorial nuance in judicial opinions by a footnote (Petition, n.4) which suggests that Judge Brieant didn't really mean to say "best efforts" the four times he so defined Respondent's contractual duties. (Petition, 83a, 89a, 99a and 110a). *See* Point II below. This is not reading between the lines; it is reading around them.

ARGUMENT

I.

The Construction of Undisputed Contract Language Is a Question of Law Not Subject to Rule 52.

The Court of Appeals correctly perceived that the entire controversy here depends upon what can be made of, or drawn from, the following terms of the agreement between Petitioner and Respondent:

> "3. The manuscript . . . will be delivered . . . by the AUTHOR to the PUBLISHER in final form and content acceptable to the PUBLISHER . . .
>
> "4. When the manuscript has been accepted and approved for publication by the PUBLISHER . . . it will be published at the PUBLISHER's own expense . . .
>
> "12. The PUBLISHER shall have the right: (1) to publish the work in such style as it deems best suited to the sale of the work; (2) to fix or alter the prices at which the work shall be sold; (3) to determine the method and means of advertising, publicizing, and selling the work, the number and destination of free copies, and all other publishing details, including the number of copies to be printed, if from plates or type or by other process, date of publishing, form, style, size, type, paper to be used, and like details."

The Court of Appeals described its function in this case as an attempt to resolve the extent to which "the [contract] language regarding promotional efforts and the promise to publish modify each other." (Petition, 17a).

The construction of undisputed contract language has long been held to be an issue of law not subject to Rule 52. *See, e.g., Eddy, et al.* v. *Prudence Bonds Corporation,* 165 F.2d 157, 163 (2d Cir. 1947), *cert. den.* 333 U.S. 845 (1948) (L. Hand, J.: ". . . appellate courts have untrammelled power to interpret written documents"); *Emor, Inc.* v. *Cyprus Mines Corporation,* 467 F.2d 770, 773 (3d Cir. 1972); *Taylor-Edwards Warehouse & Transfer Co. of Spokane, Inc.* v. *Burlington Northern, Inc.,* 715 F.2d 1330, 1333 (9th Cir. 1983); *In re Bubble Up of Delaware, Inc.,* 684 F.2d 1259, 1264 (9th Cir. 1982). There is no reason to disturb so longstanding and historically-mandated an interpretation of Rule 52.

II.

The District Court's Erroneous Grafting of the Legal Standard of Best Efforts onto the New York Common Law Implied Duty of Good Faith in the Performance of Contracts Presented the Court of Appeals With a Question of Law Not Subject to Rule 52.

The Court of Appeals' decision turned on its holding that the District Court had erred by wrongly (i) imposing upon Respondent the duty to exercise "best efforts" in the course of publishing Petitioner's book, (ii) holding that Respondent's alleged failure to provide reasons for its conduct to the District Court's satisfaction amounts to bad faith, and (iii) ignoring risk management as a legitimate reason for making business judgments.

Rule 52 has no application to such determinations of law. As this Court said in *Inwood Laboratories* v. *Ives Laboratories,* 456 U.S. 844, 855 n.15 (1982):

> "Of course, if the trial court bases its findings upon a mistaken impression of applicable legal principles, the reviewing court is not bound by the clearly erroneous standard."

A brief summary of applicable New York law will put the District Court's error in relief. New York law has long held that what the implied covenant of good faith and fair dealing requires is honesty in fact and the avoidance of sharp practice and chicanery.[7]

New York's highest court has been unequivocal on the scope of the implied good faith obligation. In *Mutual Life Insurance Co.* v. *Tailored Woman, Inc.*, 309 N.Y. 248, 128 N.E.2d 401 (1955) (cited with approval in *Neuman* v. *Pike*, 591 F.2d 191, 195 (2d Cir. 1979)), the Court of Appeals refused to ascribe bad faith to a tenant who had relocated his fur business from a floor on which part of the rent was calculated as a percentage of gross sales. In the vacated space, the tenant began to conduct a low-revenue bargain store. The Court rejected the landlord's claim of breach of the implied covenant of good faith, finding that the tenant's decision to move the lucrative part of his clothing business was motivated by legitimate business reasons, rather than any dishonesty. "*Absent fraud or trickery* . . . defendant can carry on its business in the way that suited

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7. *See*, e.g., *Grad* v. *Roberts*, 14 N.Y.2d 70, 248 N.Y.S.2d 633 (1964); *Baker* v. *Chock Full O'Nuts Corp.*, 30 A.D.2d 633, 292 N.Y.S.2d 58 (1st Dept. 1968); *Guardino Tank Processing Corp.* v. *Olsson*, 89 N.Y.S.2d 691, 699 (Sup. Ct. N.Y. Co. 1949); *Random House, Inc.* v. *Gold*, 464 F.Supp. 1306 (S.D.N.Y. 1979); *Foster* v. *Callaghan & Co.*, 248 Fed. 944 (S.D.N.Y. 1918). Cf. *In re Heard*, 6 Bankr. 876, 870-80 (W.D.Ky. 1980). *See generally* C. Fried, *Contract As Promise: A Theory of Contractual Obligation*, at 74-91 (1981); Burton, "Breach of Contract and the Common Law Duty to Perform in Good Faith," 94 Harv. L. Rev. 369 (1980).

it . . ." 309 N.Y. at 248, 128 N.E.2d at 402 [emphasis added].

In *Gordon* v. *Nationwide Insurance Co.*, 30 N.Y.2d 427, 437, 334 N.Y.S.2d 601, 609 (1972), the Court of Appeals held that "bad faith requires an extraordinary showing of a disingenuous or dishonest failure to carry out a contract."

The same Court has similarly rejected a claim of bad faith where a plaintiff alleged that his colleagues had exercised an expulsion clause in their partnership agreement against him. After finding that embarrassment created by plaintiff's behavior had provoked the defendants' action, the Court nevertheless held that plaintiff had not demonstrated bad faith because he had not alleged or shown "even a suggestion of evil, malevolent or predatory purpose." *Gelder Medical Group* v. *Webber*, 41 N.Y.2d 680, 684, 394 N.Y.S.2d 867, 870-71, 363 N.E.2d 573, 577 (1977).[8] *Cf. Collard* v. *Village of Flower Hill*, 52 N.Y.2d 594, 604, 439 N.Y.S. 2d 326, 331, 421 N.E.2d 818, 823 (1981), where the Court of Appeals held that a party's charge of "capriciou[s] or arbitrar[y]" behavior was not a sufficient allegation of bad faith in an administrative setting.

In the context of exclusive dealing arrangements the concept of good faith has been extended to imply the exercise of reasonable efforts in performance, *Wood* v. *Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 118 N.E. 224 (1917), but

8. Contrast with this holding the District Court's implications, which appear to have stopped short of a formal finding (Petition, 87a), that the "embarrassment" of one of Respondent's executives accounts for the level of promotion given the book. The District Court found such embarrassment understandable (Petition, 89a), but did not see the need to invoke it as the reason for Respondent's actions.

reasonable performance has long been distinguished from the standard of best efforts performance, as will be shown below.

The Court of Appeals did no more than to apply the essence of these longstanding New York rules to the contract between Petitioner and Respondent.

The District Court had clouded these rather simple legal propositions by its insistent references to an implied duty of "best efforts," a concept alien to New York law. The basic differences between "best efforts" and good faith performance are two: *first*, the perception of contracting laymen that "best efforts" means something more in the way of performance than would ordinarily be forthcoming, which explains why the term had been, until the District Court decision, a bargained-for promise, cf. *Robbins* v. *Ogden, Inc.*, 490 F.Supp. 801 (S.D.N.Y. 1980); *Dynamics Corp.* v. *International Harvester Co.*, 429 F.Supp. 341, 354 (S.D.N.Y. 1977); *In re Heard*, 6 Bankr. at 884; and *second*, the case law doctrine that one who promises "best efforts" promotion necessarily assumes risks of losses (short of "substantial" or "financially disastrous" losses) to maximize the benefit to the promisee, *Bloor* v. *Falstaff Brewing Co.*, 601 F.2d 609, 614-615 (2d Cir. 1979), which are risks the promisor under the lesser, implied duty of good faith doesn't assume. *Guardino Tank Processing Corp.* v. *Olsson*, 89 N.Y.S.2d at 698; *Dynamics Corp.* v. *International Harvester Co.*, 429 F.Supp. at 354. Cf. Frost, "Implied Covenants and the Duty to Develop in Underground Coal Gasification", 59 Texas L. Rev. 1175, 1305-8.

The District Court read "best efforts" into the contract functionally as well as literally, by imposing upon Respond-

ent a duty to perform to the extent of the maximum effort so much as contemplated in Respondent's internal communications, despite the fact that those contemplations were at no time communicated to Petitioner or made a part of the written contract. Internal documents drawn even before the book was in final form spoke of a 15,000 copy print run and a $15,000 budget. To the District Court, anything short of these figures had to be justified, regardless of the reasonability of what was actually done, just as if 15,000 copies and $15,000 had been written into the contract. In effect, under the District Court view discretion over the risks of expenditures was ended with those internal communications.

This transubstantiation of planning decisions into binding covenants flew in the face of relevant case authority, *see*, e.g., *Frankel* v. *Stein and Day, Inc.*, 470 F.Supp. 209, 214 (S.D.N.Y. 1979), *aff'd* 646 F.2d 540 (2d Cir. 1980); *West, Weir & Bartel, Inc.* v. *Mary Carter Paint Co.*, 25 A.D.2d 81, 85-86 (1st Dept. 1966), *app. dismissed* 19 N.Y.2d 812 (1967). It put Respondent under an obligation to perform beyond what even Petitioner's own expert characterized as Respondent's "perfectly adequate" performance in marketing Petitioner's work. (Petition, 19a). The Court of Appeals quite properly reversed such an unwarranted recasting of New York common law.

III.

The District Court's Shift of the Burden of Proof of Good Faith to Respondent Was Not a Finding of Fact Subject to Rule 52.

It is fundamental that the burden of proof is governed by state law in diversity actions involving a state-created right. *Bank of America* v. *Parnell*, 352 U.S. 29 (1956); *Palmer* v. *Hoffman*, 318 U.S. 109 (1943); *Cities Service Oil Co.* v. *Dunlap*, 308 U.S. 208 (1939); *In re Air Crash Disaster*, 635 F.2d 67, 71 (2d Cir. 1980); *H.M.L. Corp.* v. *General Foods Corp.*, 365 F.2d 77 (3d Cir. 1966) (applying New York law).

The law of New York and the preliminary decision in this case hold that the party alleging a bad faith breach of contract has the substantial burden of proving it by a preponderance of the credible evidence. *Zilg* v. *Prentice-Hall, Inc.*, 515 F.Supp. 716, 719 (S.D.N.Y. 1981); *Gelder Medical Group* v. *Webber*, 41 N.Y.2d at 684, 394 N.Y.S.2d at 870-71, 363 N.E.2d at 577; *Gordon* v. *Nationwide Insurance Co.*, 30 N.Y.2d 427, 334 N.Y.S.2d 601; *New York Central Ironworks Co.* v. *United States Radiator Co.*, 174 N.Y. 331, 335-36, 66 N.E. 967, 968 (1903); *Random House, Inc.* v. *Gold*, 464 F.Supp. 1306; *Contemporary Mission, Inc.* v. *Famous Music Corp.*, 557 F.2d 918, 922 (2d Cir. 1977); *Dynamics Corp.* v. *International Harvester Co.*, 429 F.Supp. at 348-354; *Arnold Productions, Inc.* v. *Favorite Films Corp.*, 176 F.Supp. 862, 864-66 (S.D.N.Y. 1959), *aff'd*, 298 F.2d 540 (2d Cir. 1962); *H.M.L. Corp.* v. *General Foods Corp.*, 365 F.2d at 83. This rationale is buttressed by the decision in

Brown v. *McGraw-Hill Book Company, Inc.*, 25 A.D.2d 317, 320, 269 N.Y.S.2d 35, 38 (1st Dept. 1966), where the court, in considering the scope and performance of contractual obligations, reconfirmed the old rule that "[i]n the transactions of business life, sanity of end and aim is at least a presumption, albeit subject to be rebutted."

As the Court of Appeals properly noted (Petition, 19a), the District Court nowhere found that the efforts Respondent expended on behalf of Petitioner's book failed to give the book a reasonable chance to sell. Moreover, the Court of Appeals held that Petitioner had not produced evidence either of the inadequacy of Respondent's efforts or of any bad faith purpose for Respondent's failure to do more than these "perfectly adequate" efforts. (Petition, 19a-20a).

The District Court had rejected Petitioner's theory of bad faith—that Respondent was reacting to alleged du Pont "pressure"—and even hinted that such a reaction would not be actionable. (Petition, 80a n.30). Yet the District Court expressly absolved itself of any duty to find a motive for Respondent's action[9] (Petition, 87a, 88a), and one

9. In its Memorandum and Order denying Respondent's pre-trial Motion for Summary Judgment, the District Court correctly stated that under New York law "Prentice-Hall would not breach the contract if the relevant decisions it made were guided by any legitimate business purpose." (Petition, 117a). It also there stated that Respondent "would violate its contractual duty if it provided less than reasonable efforts to promote the Book *and* did so in order to deprive the plaintiff of the benefits he would otherwise have received under the Contract." [emphasis added] The District Court went on to make it absolutely clear that Respondent's intent was at the heart of the issue of whether it acted in good faith. However, in its Findings and Conclusions, the District Court erroneously held that as between Respondent and Petitioner, "the motives of [Respondent] are probably not especially significant" (Petition, 79a-80a), and "disclaim[ed] any necessity to attribute a motive to" Respondent's actions. (Petition, 88a).

reads the District Court opinion in vain for a finding of fact on this point.[10] Instead, the District Court's unwarranted rejection of Respondent's explanation for its actions left the record barren of any evidence of bad faith.[11] However, despite its earlier opinion that proof of bad faith was a "substantial burden" for Petitioner to bear, the District Court reversed field after trial and held that the burden had been on Respondent to prove its good faith.

In doing so, the District Court defeated the rationale underlying Respondent's discretionary right under its contract. New York law has recognized that contracting parties include such provisions to avoid "bitter and protracted litigation" over such details and to free the party exercising discretion from a cascade of commercially unreasonable demands. Cf. *Gelder Medical Group* v. *Webber*, 41 N.Y.2d at 684, 394 N.Y.S.2d at 871, 363 N.E.2d at 577; *Mandel* v.

10. As noted above, the District Court stopped short of a finding that Respondent's conduct was a result of "embarrassment" over the book (Petition, 87a), and New York law is to the effect that the avoidance of embarrassment is a valid purpose which does not transgress the implied duty of good faith in commercial agreements. *Gelder Medical Group* v. *Webber*, 41 N.Y.2d 680.

11. The Petition makes much of a finding that the explanation given by one of Respondent's witnesses for the print-run reduction was a "fabrication." But precedent from this and other courts holds that disbelief of a witness is not evidence to the contrary of that witness' story. *United States* v. *Marchand*, 564 F.2d 983, 984 (2d Cir. 1977), *cert. den.* 434 U.S. 1015 (1978); *Janigan* v. *Taylor*, 344 F.2d 781, 784 (1st Cir. 1965), *cert. den.* 382 U.S. 879 (1966); *Dickinson* v. *United States*, 346 U.S. 389, 396-7 (1953); *Moore* v. *Chesapeake & Ohio Railway Co.*, 340 U.S. 573, 576-7 (1951). Furthermore, neither the District Court nor the Petition refers to the fact that a witness for Petitioner confirmed the major premise of the explanation: that Respondent believed that the Fortune Book Club was going to buy 5000 copies of the book when the first print order was placed. Should this Court grant the Petition, Respondent will most certainly argue that the finding of fabrication was "clearly erroneous," but also ultimately irrelevant.

Liebman, 303 N.Y. 88, 100 N.E.2d 149 (1951). *See also* Burton, *supra*, 94 Harv. L. Rev. at 392-394 (1980). Recently, in *Murphy* v. *American Home Products Corp.*, 58 N.Y.2d 293, 461 N.Y.S.2d 232, 448 N.E.2d 86 (1983), the Court of Appeals held:

> "New York does recognize that in appropriate circumstances an obligation of good faith and fair dealing on the part of a party to a contract may be implied and, if implied will be enforced . . . In such instances the implied obligation is in aid and furtherance of the other terms of the agreement of the parties. *No obligation can be implied, however, which would be inconsistent with other terms of the contractual relationship.*" [emphasis added] 58 N.Y.2d at 304-305, 461 N.Y.S.2d at 237, 448 N.E.2d at 91.

So the nub of where the courts below differed was in a determination of whether Petitioner or Respondent had to fill in what the District Court apparently saw as an explanatory gap as to the "why" of Respondent's actions. The District Court held that Respondent had to explain itself even in the absence of credible evidence of bad faith. The Court of Appeals held that for Petitioner to prevail on a claim of breach, Petitioner had to come forward with evidence of breach, i.e., evidence of bad faith, and that Petitioner could not merely rely upon the absence of an explanation credible to the District Court to make its case.

Even had the burden been properly shifted to Respondent, the Court of Appeals found in the Record proof of what constitutes a legitimate business reason under New York law which the District Court failed to recognize. As Petitioner's Brief to the Court of Appeals stated (at 47), the "cut [in the first printing] was ordered by Grenquist of

[Prentice-Hall] after he learned of the failure of [Prentice-Hall's] efforts to persuade [Book of the Month Club, Inc.] to reconsider its decision not to use the work." The Court of Appeals held that a cut in printing and promotion based upon BOMI's retreat would be a "rational reaction" to the diminuation of the book's commercial prospects. (Petition, 21a). In so holding, the Court of Appeals did not overrule the District Court's finding that none of the original 15,000-book print order had been earmarked for Fortune Book Club use. It simply held that such reactive measures taken in response to significant market changes were legitimate under New York law.

This Court's classic formulation of the "clearly erroneous" rule presupposes appellate testing of whether burden of proof has been met:

> "A finding is 'clearly erroneous' when *although there is evidence to support it,* the reviewing court *on the entire evidence* is left with the definite and firm conviction that a mistake has been committed." [emphasis added] *United States* v. *United States Gypsum Co.*, 333 U.S. at 395.

More recently, in *Dayton Board of Education* v. *Brinkman*, 443 U.S. 526 (1979), this Court approved a Court of Appeals' review of burden of proof as follows:

> "Based on its review of the entire record, the Court of Appeals concluded that the Board had not responded with sufficient evidence to counter the inference that a dual system was in existence in Dayton in 1954." 443 U.S. at 536.

So examination of whether a burden of proof has been met is entirely proper for a Court of Appeals. That in-

quiry was a brief one here: the Court of Appeals said there was *no* evidence to support the charge of bad faith. It is difficult to imagine that a proper issue for this Court's scrutiny is presented by a Court of Appeals' omission of the shibboleth "clearly erroneous" once it has already called a record barren of evidence to support a judgment.

Conclusion

For the reasons stated above, the Petition should be denied.

Dated: March 15, 1984

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List of Parent Companies, Etc. Pursuant to Rule 28, Supreme Court of the United States Revised Rules

1. Name of corporation on whose behalf this Brief is filed:

   Prentice-Hall, Inc.

2. Parent companies of Prentice-Hall, Inc.:

   None.

3. Subsidiaries (other than wholly-owned subsidiaries) of Prentice-Hall, Inc.:

   Editora Prentice-Hall do Brasil Limitada
   Brookvale Developments No. 1 Pty. Limited
   Brookvale Developments No. 2 Pty. Limited
   International Book Distributors Ltd.
   International Depository of Australia Pty. Limited
   Prentice-Hall Canada Inc.
   Prentice-Hall of Australia Pty. Limited
   Prentice-Hall of India Private Limited
   Prentice-Hall Japan, Inc.

4. Affiliates of Prentice-Hall, Inc:

   Know How, Inc.